August 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.21 Motion to Compel Discovery

2. Information or Evidence That Must Be Disclosed by the Prosecuting Attorney

Insert the following case summary on page 44 before the beginning of subsection 3:

A defendant argued that the prosecution's failure to disclose a corrections officer's memorandum indicating that the defendant possessed a deadly weapon and had recently threatened to kill a specific inmate constituted a *Brady* violation sufficient to undermine confidence in his conviction of purposely causing a corrections officer's death by "prior calculation and design." *Zuern v Tate*, ___ F3d ___, ___ (CA 6, 2003). In *Zuern*, the defendant asserted that the content of the memorandum supported his argument that he planned to kill a fellow *inmate*, not a corrections officer, so that the "prior calculation and design" element did not apply to the defendant's instantaneous assault on the corrections officer. *Zuern*, *supra* at ___.

The Sixth Circuit ruled that the defendant failed to establish a reasonable probability that the outcome of his trial would have been different if the prosecution *had* provided him with a copy of the officer's memorandum:

> "We find that even assuming the memorandum would have helped [the defendant] prove that he planned to kill [another inmate], nevertheless he would have been found guilty because the jury would still have found that he had planned to kill a corrections officer.
>
> "After hearing evidence of [the defendant's] deliberate and prolonged creation of a murder weapon, the jury certainly could find that [the defendant] acted with prior calculation and design to kill someone. . . . [E]ven if [the defendant] had used the memo to persuade the jury that he planned to kill [the inmate], we do not believe there is a reasonable

probability that the jury would have found that [the defendant] had not planned to kill a corrections officer." *Zuern*, *supra* at ___.

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

5. Michigan's "Separate Sovereign" Rules

Add the following text to the end of subsection 5 on page 55:

In *People v Zubke*, ___ Mich ___, ___ (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug-conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Zubke*, *supra* at ___.

The Court concluded that the "thing done" for federal purposes was the conspiracy itself, the defendant's agreement with others to possess and distribute cocaine. *Zubke*, *supra* at ___. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of cocaine. Ruling there was no double jeopardy violation, the Court stated simply:

> "[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Zubke*, *supra* at ___ n 5.

The Michigan Supreme Court also overruled *People v Avila (On Remand),* 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "*arose out of* the same acts." *Zubke, supra* at ___, quoting *Avila, supra* at 251 (emphasis added).

6.40 Motion in Limine—Evidence of Other Crimes, Wrongs, or Acts

Insert the following language on page 97 immediately before the beginning of Section 6.41:

The trial court did not abuse its discretion by admitting evidence against the defendant of his consensual relationships with two young women other than the complainants, as well as evidence of the defendant's indecent exposure convictions returned by the jury at the defendant's first trial. *People v Ackerman*, ___ Mich App ___, ___ (2003).

In *Ackerman*, the defendant was the mayor of Port Huron and served as a supervisor at a community youth center during the time of his misconduct. Several young females testified that the defendant allowed his pants to fall down to expose his genitals to the girls when they were at the youth center. The trial court permitted the evidence because it was relevant to the defendant's plan, scheme, and system of introducing young females to his sexual misconduct, and the court determined that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. The Court of Appeals affirmed the trial court's admission of this other-acts evidence and agreed it was offered for the proper purpose of "show[ing] defendant's system of selecting, desensitizing and seducing victims." *Ackerman*, *supra* at ___.